

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE SOUTHERN DISTRICT OF TEXAS  
3                   MCALLEN DIVISION  
4

5       LETICIA GARZA GALVAN, ET AL     §      CASE NO. 7:18-CV-00113  
6       VERSUS                                  §      MCALEN, TEXAS  
7       DAVID WHITLEY, ET AL                §      WEDNESDAY  
8    §      OCTOBER 16, 2019  
9    §      4:12 P.M. TO 4:41 P.M.

10                   MOTIONS HEARING

11                   BEFORE THE HONORABLE RICARDO H. HINOJOSA  
12                   UNITED STATES DISTRICT JUDGE

13                   APPEARANCES:                   SEE NEXT PAGE

14                   COURT RECORDER:               ANTONIO TIJERINA

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1                   MCALLEN, TEXAS; WEDNESDAY, OCTOBER 16, 2019; 4:12 P.M.

2                   THE COURT: Civil Action No. M-18-113, Frederico  
3 Flores, Jr. and others versus Texas Secretary of State and  
4 others.

5                   Can we have announcements for the parties as to  
6 who's here?

7                   MR. GARZA: Jose Garza for the Defendants Martinez  
8 Garcia, Daugherty I, Daugherty II.

9                   THE COURT: That's the local Board?

10                  MR. GARZA: The local Board, yes, sir.

11                  MR. ABRAMS: Michael Abrams for the Texas  
12 Secretary of State.

13                  THE COURT: Well I guess now is Ms. Hughes; is  
14 that correct?

15                  MR. ABRAMS: That's correct, Your Honor.

16                  MR. WHATLEY: Austin Whatley for Plaintiffs.

17                  THE COURT: I guess the issue here is the motion  
18 for summary -- competing motions for summary judgment. The  
19 Plaintiffs' claim and cite court cases in Federal Courts  
20 that -- the issue is the mail-in-ballots and the dispute  
21 over -- you have to sign it twice and whether there's a  
22 question by the Board, the counting Board, as to whether  
23 these match.

24                  The three plaintiffs that we have remaining and it  
25 is these three plaintiffs that we still have, they were

1 notified after the election that their vote was not counted.

2 They did receive a notice, right?

3 MR. WHATLEY: After the election, Your Honor.

4 THE COURT: Right, because the Election Code of  
5 the State of Texas says you have to receive notice within  
6 10 days after the election, but no remedy is provided.

7 Other than I guess some official can file a lawsuit, but not  
8 the individuals.

9 And how do we --

10 MR. ABRAMS: Yes, Your Honor. The County Election  
11 Official can file an injunctive suit in the State District  
12 Court. In fact, we cited to an instance when that did  
13 happen in Caldwell County. And that's at Docket 70-1.

14 THE COURT: Yeah, but the cases that -- the  
15 federal cases that ruled on this very same subject have said  
16 you need to be notified before the election so that you can  
17 have some remedy available to you.

18 The State statute doesn't provide any personal  
19 remedy to you other than maybe somebody might make the  
20 Complaint, but nobody really is. I mean, you actually have  
21 to -- there's nothing left for the individual voter.

22 MR. ABRAMS: Well, they can go to a County  
23 Election Official and the County Election --

24 THE COURT: Right, but not themselves. I mean,  
25 they can't do anything themselves. There are at least like

1 three other Federal Courts that have already said in other  
2 states this is a procedural due process violation. And so  
3 therefore you have to have some rights.

4                   And those seem to indicate that you need the  
5 requirement before the election to be notified there's  
6 something wrong with your ballot here. At least the  
7 mail-in. They can't really look at the ballot. It's  
8 just -- it has something to do with the application.

9                   MR. ABRAMS: Well, a few points to that, Your  
10 Honor. None of those other cases have this procedure were  
11 County Election Official could actually bring a suit.

12                  THE COURT: Didn't one of them have that  
13 procedure?

14                  MR. ABRAMS: I don't believe so. I mean, I think  
15 this statute took effect in September 1st of 2017 in Texas.  
16 So it's still relatively new.

17                  THE COURT: Yeah, but the procedure doesn't even  
18 come close to satisfying the ability to have some procedural  
19 due process with regards to your -- it would appear to me  
20 that something before the election is more important than  
21 something after the election.

22                  MR. ABRAMS: I'm not sure the statute says that  
23 they -- it has to be provided after the election. The  
24 County --

25                  THE COURT: I didn't read it -- I mean, if it

1 doesn't, why did these people not receive notice?

2 MR. ABRAMS: Well, in this case the notices were  
3 dated March 6th, which was the date of the Primary. So they  
4 had probably submitted their mail-in ballots several days  
5 before. And then the notices were -- the notice of  
6 rejection was signed the day of.

7 And so that would theoretically give you time.  
8 And, Your Honor, it's possible there are instances where,  
9 you know, you could conceive of a situation where someone  
10 isn't given notice in time.

11 But the record here doesn't show that the statute  
12 is facially unconstitutional in all circumstances. I think  
13 that that's the --

14 THE COURT: Well, it's really unconstitutional in  
15 all circumstances before the election. At least that's the  
16 argument that the Plaintiffs are making. That why do I care  
17 after the election that somebody might notify me that it was  
18 rejected, but I really -- there's nothing I can do about it.

19 I mean, your vote belongs to you as an individual.  
20 It doesn't belong to some generality. I mean, it's your own  
21 personal right, which I consider one of our most personal  
22 right to the United States, the right to vote.

23 MR. ABRAMS: Well, what the Plaintiffs are asking  
24 for is a post-election remedy. I mean, they're asking for  
25 the right to -- if a ballot is rejected, to have the right

1 after the election to find a way to fix it. And what the  
2 Secretary of State is saying is that there is a provision  
3 here. And the Plaintiffs contend it's inadequate.

4 THE COURT: No, what I hear the Plaintiffs saying  
5 is, Judge, you just need to find the statute  
6 unconstitutional because the State of Texas needs to amend  
7 their statute to reflect that before the election they need  
8 to be notified.

9 I mean, I think that's what they're saying. That's  
10 the relief they would like.

11 MR. ABRAMS: Well, I don't know if they put  
12 forward any specific request for relief, so.

13 THE COURT: Well, they have said this is  
14 unconstitutional, we're attacking on a constitutional basis,  
15 Judge, this is procedural due process under the Section  
16 1983, the 14th Amendment.

17 We're -- it's our right to vote. There's nothing  
18 that gives us any due process with regards to trying to  
19 correct this.

20 MR. ABRAMS: Well, the other issue, Your Honor, is  
21 that these Plaintiffs don't intend to vote by mail in the  
22 future elections. They've acknowledged that they've  
23 disclaimed an intent to vote by mail. They'll only vote in  
24 person in future elections. So that's our --

25 THE COURT: Well, they might or they might not.

1 They can't tell us for sure that they're not going to be  
2 sick and they won't be able to walk over there. They can't  
3 tell us that for sure. At some point, they may be able to  
4 have to vote by mail again. Or they may be out of the  
5 country or they may be whatever.

6 What they're saying is it is unconstitutional,  
7 it's unconstitutional when it happened to us and therefore  
8 this is a violation on the part of the State of Texas with  
9 no procedural due process.

10 And the idea that they have testified, well, I  
11 don't really want to again try to subject myself to this in  
12 depositions. Well, yes, I understand that, but that doesn't  
13 mean that you're not going to be put in a physical situation  
14 where you won't have a choice or you will not be here on  
15 certain days or whatever.

16 MR. ABRAMS: Right, Your Honor.

17 THE COURT: I mean, you still don't answer to me  
18 how we get around all the other cases that are the same  
19 thing. And the other Federal Courts have already said this  
20 is a problem.

21 MR. ABRAMS: I think in this case, the fact the  
22 record doesn't have evidence that this process is  
23 inadequate.

24 THE COURT: Well it is inadequate. There's  
25 nothing you can do before the election. You didn't even

1 know.

2 MR. ABRAMS: Well, that's because the ballots  
3 aren't required to be -- I mean, the ballots can be --  
4 someone can vote by mail and delivered to the early voting  
5 ballot Board, I believe, up to the day after the election.  
6 And so -- and that's to give the voters more time to vote.

7 And so the voters have the opportunity to vote by  
8 mail up to that point. I don't think --

9 THE COURT: The mail ballots have to received by a  
10 certain point before they're counted. They just can't keep  
11 on coming in and be counted. There's a deadline within  
12 which the mail ballots have to be received.

13 MR. ABRAMS: Right.

14 THE COURT: And if somebody didn't mail it in  
15 time, they're not going to be counted. That's not the  
16 argument here.

17 MR. GARZA: I think if they're postmarked before  
18 the election.

19 THE COURT: They're postmarked, yes, but --

20 MR. GARZA: They can be received after the  
21 election.

22 THE COURT: Yes, but not --

23 MR. GARZA: Right, not forever. Indefinitely.

24 THE COURT: -- received -- you postmarked it like  
25 the day of the election or something. I don't know if

1 that's the day that's the deadline here, but there has to be  
2 a deadline anyway. It isn't that they can keep on coming.

3 MR. ABRAMS: Right. I believe it's up to -- it  
4 has to be received the day after the election is the drop  
5 dead deadline.

6 And so that's when the ballots could be counted  
7 and then -- well, well there's a difference to between  
8 counting the ballots and reviewing whether the signatures on  
9 the application and the carrier envelopes are the same.

10 So theoretically a voter could get a notification  
11 before the election, I believe.

12 THE COURT: Well, they might or might not. I  
13 mean, there are people who will not.

14 MR. ABRAMS: That may be true and I still think it  
15 goes to --

16 THE COURT: So how do you explain those cases?

17 MR. ABRAMS: Well, I think that there is -- well  
18 two distinguishing --

19 THE COURT: The one thing that within 10 days  
20 after the election you may be notified, but at that point  
21 what -- they're not going to count them. They won't be  
22 counted.

23 MR. ABRAMS: Well, we don't know that, Your Honor,  
24 because --

25 THE COURT: Well there's already -- I mean, you

1 have do it before the canvassing Board and I don't know what  
2 the deadline is for the canvassing Board. And the  
3 canvassing Board --

4 MR. ABRAMS: The canvassing has to occur no later  
5 than 11 days after the election. And so we could have an  
6 instance where, in this case for instance --

7 THE COURT: Right, but they have 10 days to notify  
8 you. So they may postmark it on the 10th day. The  
9 canvassing Board has already met. And so therefore, you  
10 have no remedy because the statute says it has to be  
11 presented to the canvassing Board as far as your Complaint  
12 or whatever it is. That's get presented to them. At least  
13 I understand it that way.

14 MR. ABRAMS: The early -- I'm not sure I  
15 understood that point, Your Honor.

16 THE COURT: The notice to them has to be sent  
17 before the canvassing Board meets.

18 MR. ABRAMS: The notice has to be sent within  
19 10 days after the election.

20 THE COURT: Right, but there's something in that  
21 statute about the canvassing Board and their involvement  
22 here.

23 MR. ABRAMS: Right, the County Election Official  
24 can file an injunctive suit before the time for canvassing  
25 occurs, which is by statute no later than 11 days after the

1 election.

2 THE COURT: All right, and what -- that doesn't  
3 give the right to the person that's being hurt here. The  
4 fact that the County Election Official might be able to.

5 And I don't know if you've ever been involved in  
6 politics, but the County Election Official has certain  
7 responsibilities with regards to having sides one way or  
8 another possibly.

9 And so that still doesn't solve the problem. It  
10 isn't the County Election Official that has had a procedural  
11 due process claim here. It's the voter that's having the  
12 procedural due process claim here.

13 And their point is, you can't really tell me,  
14 Judge, that somehow we're outside the other cases that have  
15 been decided because the County Official might, if they so  
16 desire, after the election go file an injunction for me  
17 rather than me being able to do anything myself.

18 MR. ABRAMS: Your Honor, what the record reflects  
19 is that that has at least happened in one other instance.  
20 And there's just not enough --

21 THE COURT: And it may have happened, but it  
22 doesn't mean that it really still protects the individual's  
23 rights here. The procedural due process is for the  
24 individual, not for the County Election Official.

25 MR. ABRAMS: Well if someone's procedural due

1 process rights can be protected by this injunctive suit,  
2 then we contend that there still is a mechanism --

3 THE COURT: And someone might not. And it's left  
4 up to that individual to assert your procedural due process  
5 under the Constitution in Section 1983, as opposed to  
6 yourself being able to do this.

7 MR. ABRAMS: Your Honor, this is the procedure  
8 that the Texas Legislature developed to provide a remedy and  
9 I don't think it's been tested as in those cases. I think  
10 that's the distinguishing factor here.

11 THE COURT: Did you want to respond to any of  
12 this?

13 MR. WHATLEY: I think it's a distinction without a  
14 difference Your Honor. I think as you've rightfully queued  
15 on, this isn't an alternative process for the Plaintiffs.  
16 And if -- even if you point to an alternative process, if  
17 it's unavailable to the Plaintiff or patently inadequate,  
18 it's not an alternative process and it can't stand.

19 MR. ABRAMS: Your Honor, we think that the process  
20 that the Plaintiffs --

21 THE COURT: I think it's the process, but frankly  
22 I mean, I don't even know that anybody in the State  
23 Legislature is aware that this is the process. I mean, I  
24 don't think that anybody has really stopped -- I don't think  
25 that that was put in there to protect a procedural due

1 process rights.

2 MR. ABRAMS: Well, I don't think the record  
3 reflects on that one way or the other. The process is  
4 there.

5 THE COURT: Okay, how long has it been there? The  
6 process is there after the election and has nothing to do  
7 with the individual themselves.

8 MR. ABRAMS: It's been in effect --

9 THE COURT: It doesn't -- yes, it's been there,  
10 but nobody's complained about it.

11 MR. ABRAMS: You mean in another -- except for  
12 this lawsuit.

13 THE COURT: Exactly right. This lawsuit. And  
14 just like in those other states that are very recent with  
15 the regards to Federal Courts stepping in with regards to  
16 the rights of the individual voter. And so, yes, it's all  
17 recent.

18 MR. ABRAMS: Right.

19 THE COURT: Those cases are recent. This  
20 challenge to this State's system is recent.

21 MR. ABRAMS: Right, I just --

22 THE COURT: I know you were sent down here to say  
23 that, but from a common sense standpoint, I don't even know  
24 that the Secretary of State had given -- I don't even know  
25 how long she has been the Secretary of State. I suspect not

1 too long.

2 MR. ABRAMS: It was a recent appointment, Your  
3 Honor.

4 THE COURT: Right and so I don't even know that  
5 she -- does she even know we have this lawsuit?

6 MR. ABRAMS: Yes, Your Honor and we have General  
7 Counsel for the Secretary of State here.

8 THE COURT: Well, the General Counsel, of course,  
9 knows because he's been the General Counsel for awhile.

10 MR. ABRAMS: I believe the Secretary of State is  
11 aware.

12 THE COURT: That there's a lawsuit, but really  
13 hasn't sat down and had a discussion with somebody about  
14 these other cases that have ruled on it.

15 MR. ABRAMS: Well, the Texas Secretary of State  
16 can't amend state law. And in fact, that goes to --

17 THE COURT: No, the Secretary of State cannot  
18 amend state laws, I understand that completely. At the same  
19 time, the Secretary of State has a lot to do with regards to  
20 suggesting that the legislature do certain things in order  
21 to comply with federal statutes, federal Constitution. And  
22 that Courts are going in this direction and that we need to  
23 change something here or we have a problem.

24 I mean that's what the Secretary of State does.  
25 She's in charge of the elections in the State of Texas. And

1 so, from that standpoint, I think she is the proper party  
2 because this is a state statute that's being challenged not  
3 the action of the local County Clerk or whoever is the  
4 County Clerk who is in charge of the elections locally at  
5 that -- for the County Elections and these elections that  
6 were being held.

7                 But in the end, it's the Secretary of State that  
8 protects the statute.

9                 MR. GARZA: On that note, Your Honor, I don't want  
10 to interfere with the flow of the debate or discussion,  
11 but --

12                 THE COURT: I would welcome you to interfere with  
13 the flow of this discussion.

14                 MR. GARZA: The Plaintiffs have affirmatively  
15 abandoned the "as applied" cause of action which we be then  
16 something that would be aimed at the Election Board. And  
17 that they have agreed as stated in their responses that the  
18 Board is entitled to qualified immunity.

19                 And as the Court just indicated, the Secretary of  
20 State is the proper party to defend the statute on this --

21                 THE COURT: It's an attack on the statute is what  
22 it is.

23                 MR. GARZA: Exactly.

24                 THE COURT: It's not an attack --

25                 MR. WHATLEY: Your Honor, the local Election Board

1 has no role anymore now that the State --

2 THE COURT: No, the Election Board was just  
3 following the law.

4 MR. WHATLEY: That's right.

5 THE COURT: They didn't have -- there was no  
6 statute requiring them to do -- there's nothing that they  
7 did wrong. They decided that this didn't meet the  
8 requirements. They complied with the statute. They sent  
9 out the notices during the 10-day period. And so this isn't  
10 really about the local Election Board.

11 MR. GARZA: Right, so regardless of the Court's  
12 ruling on the --

13 THE COURT: I mean the local Election Board isn't  
14 responsible for the statute.

15 MR. WHATLEY: Right.

16 THE COURT: There's nothing to indicate here that  
17 the local Election Board did anything contrary to what the  
18 present statute is supposed to do.

19 MR. WHATLEY: Exactly.

20 MR. GARZA: Your Honor, --

21 THE COURT: Unless he's going to accuse him of  
22 blatantly just lying for political purposes or something in  
23 kicking these ballots out when they don't even know who they  
24 voted for.

25 MR. GARZA: At this stage, under the Amended

1 Complaint and under the most recent filings by the  
2 Plaintiff, the only reason the Board is in is because  
3 they're sued in their official capacity because they  
4 enforced the statute.

5 But they have nothing within their discretion or  
6 within their power that they can offer in terms of what the  
7 Plaintiff seeks. So regardless of where the Court moves on  
8 the broad question of the constitutionality of the statute  
9 and we didn't address it in our filings, the State did.

10 And we nominally accepted the State's position on  
11 that. The Board should be dismissed.

12 MR. WHATLEY: Your Honor, we would completely  
13 disagree with that. It is correct that we have said that  
14 they are entitled to qualified immunity, but that's only for  
15 personal capacities.

16 In Section 1983 Civil Rights lawsuits, the  
17 Government officials with the responsibility of enforcing  
18 the challenged law are the proper defendants and that's been  
19 stated by the Fifth Circuit --

20 THE COURT: They're not the ones in charge of the  
21 law.

22 MR. WHATLEY: Yes, Your Honor, but --

23 THE COURT: They had nothing to do with this law.

24 MR. WHATLEY: But they are the ones who enforce  
25 it.

1                   THE COURT: And it's a law -- that's the law.  
2 They -- your Complaint here, unless you want to just mess it  
3 up here. In your Complaint here is that the Statute is  
4 unconstitutional. That's the only claim that you really  
5 have.

6                   There's nothing to indicate that this Board did  
7 anything that they -- that the present statute requires them  
8 to do. In fact, quite to the contrary, they seemed to have  
9 complied with the statute as they were supposed to.

10                  So there's nothing that they have done. They  
11 didn't write the statute. And it's the Secretary of State  
12 who's responsible for the statute, if you're going to attack  
13 the constitutionality of the state's statute not this  
14 individual Board.

15                  MR. WHATLEY: Yes, Your Honor, if I --

16                  THE COURT: You've given me nothing to indicate  
17 that this individual Board purposely went to pick these  
18 individuals out and said we're not going to count their  
19 votes.

20                  MR. WHATLEY: Right, it's not as an applied  
21 challenge, Your Honor. But what is, is the Board are the  
22 ones that are actually enforcing this and they're the ones  
23 picking and choosing which signatures match or mismatch.

24                  THE COURT: That's going to be even if we have a  
25 statute that matches what the other Federal Courts are

1 asking. It will always be on the particular Board's  
2 responsibility.

3 MR. WHATLEY: I completely agree, Your Honor.

4 THE COURT: I mean, somebody has to do it. It's  
5 not magic. It isn't like we're going to put these names in  
6 a machine and then maybe some day we will. A machine will  
7 be able to determine these signatures are so different I'm  
8 cutting them out.

9 But that's not where we're at. So this Board  
10 doesn't do anything other than whatever -- you've complained  
11 nothing other than they should have done something.

12 Well, they did what the statute requires them to  
13 do. They can't go writing the statute.

14 MR. GARZA: WHATLEY: The only thing that's left  
15 is this official capacity claim. And as far back as  
16 *Kentucky versus Graham*, the Supreme Court has said that a  
17 official capacity lawsuit is essentially a lawsuit against  
18 the entity.

19 They represent Starr County. Starr County has  
20 nothing to do with this. The entity they need is the State  
21 of Texas.

22 THE COURT: Starr County has a lot to do with a  
23 lot of things that are very good.

24 MR. GARZA: That's right. That's right, Your  
25 Honor.

1           THE COURT: But that's just a statement made by  
2 the Court with nothing to do with anything other than  
3 claiming my county originality. But that was a complete  
4 joke.

5           It has nothing to do with anything as far as the  
6 legal aspect of things here. Not that I don't like Starr  
7 County, quite to the contrary.

8           MR. WHATLEY: Just to clarify, Your Honor, Starr  
9 County is not entitled to sovereign immunity. I didn't know  
10 if we were making that argument or not.

11          MR. GARZA: No, I didn't make that argument at  
12 all. All I said is the lawsuit is against the entity, the  
13 entity at stake here is the State.

14          THE COURT: The lawsuit is an attack on the  
15 statute that's all this lawsuit's about.

16          MR. GARZA: That's right. That's right.

17          THE COURT: There's nothing that the State has  
18 done that that isn't in compliance with the statute.  
19 There's nothing that the county employees did that is not in  
20 compliance with the statute.

21          The Complaint here is the statute -- at least in  
22 the cases that have been won here, the Complaint is there's  
23 something wrong with the statute. It's not that the  
24 Secretary of State is responsible for this or.

25          The Secretary of State in this case has to be the

1 party because he's the one that will -- he or she is the one  
2 that's trying to defend the statute.

3                 But as far as a local Board, I mean, what are they  
4 doing? That's your claim here that this is a problem with  
5 regards to your clients that their procedural due process  
6 under Section 1983 and the 14th Amendment has not been  
7 protected here.

8                 MR. WHATLEY: Right, Your Honor.

9                 THE COURT: As far as I'm concerned, you don't  
10 have anything else that you can really have a claim here.

11                 MR. WHATLEY: Yes, Your Honor. We can move on,  
12 it's just that we did and do still hold that as the ones  
13 enforcing it, we do think they are proper parties and liable  
14 under *Buchanan v. Alexander*, but.

15                 THE COURT: Liable for what? I mean for following  
16 the laws it was and that they have the responsibility of  
17 rewriting the statute and say we're not going to follow the  
18 statute?

19                 MR. WHATLEY: No, Your Honor. But as the local  
20 officials enforcing the law, they are considered proper  
21 parties under Fifth Circuit precedent.

22                 THE COURT: They may be proper parties, but  
23 they're nominal proper parties if they are. There's not  
24 anything you're going to get from them.

25                 MR. WHATLEY: Right, Your Honor, but we would

1 still say that that --

2 THE COURT: Well are you going to make your  
3 argument or not? Are you going to make the argument on the  
4 strong point that you have? I think I sort of lead you in  
5 that direction, but we're not there yet, I guess. We're  
6 still arguing about this local Board that you haven't shown  
7 me did anything that was contrary to what the statute  
8 allowed them and required them to do, other than you're  
9 still fighting that.

10 You've got the Secretary of State here. This is  
11 the person that really has control over statewide elections  
12 and statewide voting statutes. And so this is the person.

13 MR. WHATLEY: Yes, sir, Your Honor.

14 MR. ABRAMS: Your Honor, obviously we've argued  
15 that the Secretary of State is not a proper party.

16 THE COURT: Why? We have no parties here as far  
17 as what every --

18 MR. ABRAMS: I understand the Court appears not to  
19 be leaning in our direction on that, but I just wanted to  
20 preserve that argument for the record.

21 THE COURT: No, I know you have that argument, but  
22 there has to be somebody here for the State statute.

23 MR. ABRAMS: Well they've chosen to sue the  
24 Secretary of State, but I'm not sure that any case says  
25 there has to be a remedy if someone has a problem with the

1 statute.

2 So and the Secretary of State does not have any  
3 control over the mail-in valid provisions that are at issue  
4 here.

5 THE COURT: No, the Secretary of State is -- the  
6 person in the State of Texas that is responsible for the  
7 elections being conducted properly. Their Complaint is  
8 there is something unconstitutional with regards to a  
9 statute and the Secretary of State is being asked to enforce  
10 here. So we are suing the Secretary of State to try to get  
11 to the statute itself.

12 MR. ABRAMS: And this goes to possibly what might  
13 be the next stage based on where --

14 THE COURT: I mean, it isn't like Ruth Hughes  
15 personally going to be liable here.

16 MR. ABRAMS: No, no, because this is an official  
17 capacity claim.

18 THE COURT: Right, exactly.

19 MR. ABRAMS: But, there's no injunction that could  
20 issue against her that would effectively remedy the  
21 Plaintiffs' claims because --

22 THE COURT: No, all that can be said here is that  
23 it's an unconstitutional provision and the Court has said  
24 that and they have to do something about it because that's  
25 what the other Federal Courts have done.

1                   MR. ABRAMS: Well, and to the point that they have  
2 to do something about it, that's the crux of the issue with  
3 these official capacity claims is who has to do something  
4 about it.

5                   THE COURT: Well, the State Legislature has to do  
6 something about it or somebody has to. And for as long as  
7 the Court says it's unconstitutional it can't be enforced.  
8 And so I would suspect that somebody would want to fix it as  
9 soon as possible if that's what the ruling were to be.

10                  MR. ABRAMS: And the Secretary of State, as we  
11 previously discussed, cannot fix the statute on her own.

12                  THE COURT: No, she can't fix the statute on her  
13 own, but if anybody is going to have an interest in getting  
14 it fixed, it would be the Secretary of State because he or  
15 she is the one that runs the state elections.

16                  MR. ABRAMS: The Secretary of State can implement  
17 any changes.

18                  THE COURT: I know, but the Secretary of State can  
19 go to the State Legislature and say we need to correct this  
20 or somebody needs to.

21                  MR. ABRAMS: Well, it depends on what the Court  
22 does, Your Honor. And Your Honor, if I could? If the Court  
23 is inclined to disagree with our arguments that the  
24 Secretary of State isn't the proper party, that the  
25 Plaintiffs lack standing, that the process is sufficient as

1 it is, the Plaintiffs haven't put forward a suggestion of  
2 what specific injunction would look like, so if the Court is  
3 inclined to disagree with our --

4 THE COURT: I haven't even said that I'm going to  
5 grant them an injunction. I'm just -- I was hoping that you  
6 could go back to your office and tell them what the Court  
7 was saying and see if there's someway that you could reach  
8 an agreement with the Plaintiffs here to try to fix this for  
9 the future and everybody else, including themselves.

10 MR. ABRAMS: Your Honor, I'm an Assistant Attorney  
11 General and I will pass --

12 THE COURT: Well, don't underestimate your  
13 authority to basically go back and say, you should have  
14 heard the Judge. He was suggesting that perhaps we should  
15 sit down and have some discussion with them about how we can  
16 try to -- and I think you need to give them these federal  
17 cases.

18 And say, you know, this is what the Court was  
19 talking about. And I think that we, in our office, need to  
20 figure out how we're going to proceed with this.

21 MR. ABRAMS: And, Your Honor, there is another --  
22 which I'm sure the Court is aware -- there is another  
23 lawsuit in San Antonio.

24 THE COURT: Well, you should have told me that at  
25 the very start. I would have gladly waited for that one to

1 be done.

2 MR. ABRAMS: Well that one is in its infancy.

3 It's just --

4 THE COURT: Well, it isn't like we've gone past  
5 the childhood very much here.

6 MR. ABRAMS: Your Honor, that --

7 THE COURT: I still -- we're still not walking  
8 even.

9 MR. ABRAMS: That case is -- I think a motion to  
10 dismiss has been filed, but it's still pretty new. But  
11 there is a --

12 THE COURT: And is it in Federal Court?

13 MR. ABRAMS: It is, Your Honor.

14 THE COURT: Okay and who's the judge in that case?

15 MR. ABRAMS: It is Judge Orlando Garcia in  
16 San Antonio.

17 THE COURT: I would suspect that he would read  
18 these cases and is going to. If you want me to wait for him  
19 to do it, I'll be glad to.

20 MR. ABRAMS: Your Honor, --

21 THE COURT: I have given you-all what I've given  
22 you-all. I'm going to have you back here in 30 days for a  
23 status conference so you can tell me exactly what it is that  
24 each side wants this Court to do.

25 And so we already told you we filed motions. But

1 you didn't hear me before you filed the motions. Having  
2 said that, that doesn't mean that you-all need to stop  
3 talking especially if there is one in San Antonio.

4 MR. ABRAMS: There is a case in San Antonio that  
5 raises the exact same claims.

6 THE COURT: Yes, and I think that you-all should  
7 watch that one closely also.

8 MR. WHATLEY: Your Honor, before we're dismissed,  
9 I might try the patience of the Court. We have -- we've  
10 submitted an exhibit --

11 THE COURT: I'm more patient than I was 36 years  
12 ago.

13 MR. WHATLEY: We have submitted exhibits of some  
14 of these other cases where some of the orders that were in  
15 there and we have mentioned them in briefing. And we do  
16 think you have the authority to issue one of those.

17 I know that you said you're not going to be doing  
18 that today. But an example of one would be Florida Democrat  
19 Party --

20 THE COURT: I've seen them, yes.

21 MR. WHATLEY: Okay.

22 THE COURT: Do you think the Florida Democrat  
23 Party did the right thing?

24 MR. WHATLEY: Yes, Your Honor.

25 THE COURT: Maybe I should bring you-all

1 Christmas Eve here. I won't do that to you-all.

2 December the 12th at 4:00 p.m.

3 And the one in San Antonio is voters in Bexar  
4 County that brought this action?

5 MR. ABRAMS: I believe so. I believe it's voters  
6 in several different counties.

7 THE COURT: Is it a class action?

8 MR. ABRAMS: No, but it's several different  
9 Plaintiff groups. We can file an advisory with the Court  
10 about the case information.

11 THE COURT: And how long ago was this case filed?

12 MR. ABRAMS: I believe it was two or three months  
13 ago.

14 THE COURT: What's kept them so long?

15 MR. ABRAMS: Your Honor, we just defend the  
16 lawsuits. We don't bring them.

17 THE COURT: And unlike these guys, you don't get  
18 paid by the hour?

19 MR. ABRAMS: That's correct. Salary.

20 THE COURT: If you-all don't have anything else,  
21 you-all can be excused so I can take a guilty plea.

22 (The parties thank the Court.)

23 (Proceeding adjourned at 4:41 p.m.)

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1           *I certify that the foregoing is a correct  
2 transcript to the best of my ability produced from the  
3 electronic sound recording of the proceedings in the above-  
4 entitled matter.*

5 /S/ MARY D. HENRY

6 CERTIFIED BY THE AMERICAN ASSOCIATION OF  
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